Calculating Tort Damages in Motor Vehicle Collision Claims in Ontario

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November 2023

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I. INTRODUCTION

It has been almost two decades since a Conservative government implemented Ontario's third major tort reform automobile compensation system. It came into force on October 23, 1996. That fall I presented the first iteration of this paper which explained how tort damages should be calculated under this new system. Since then, significant changes have been made to the legislation in 2003, 2006, 2010, 2011 and 2015. Additionally, there have been a number of judicial decisions interpreting various provisions of this scheme. This paper is intended to provide a reasonably comprehensive analysis of how tort damages should be calculated for accidents occurring on or after June 4, 2015, based on the law as of October 1, 2023.[1] These changes are largely embodied in Bills 198 (2003), 18 (2006) and 34 (2010).

Bill 59 ("Bill 59") ushered in a complex and confusing damage assessment model for victims of automobile crashes. Bill 198, which came into force on October 1, 2003, made several changes to the damage calculation rules.[2] Further significant changes were introduced in Bill 18 which rewrote the vicarious liability rules for leased and rented automobiles effective March 1, 2006. Bill 34 made some additional changes to the tort reform model effective September 1, 2010. A minor amendment was made in May of 2011 which affects public transit vehicles. Finally, effective June 4, 2015, the provisions which indexed deductibles and vanishing deductibles came into force.

In previous versions of this paper, I have commented on the changes originally ushered in by Bill 59 and then on the modifications to this regime contained in Bill 198. In this paper, I intend to simply discuss the law is it stands today without considering the differences between the various

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[1] S.O. 1996, c.21. The formal title of the Bill is the *Automobile Insurance Rate Stability Act (AIRS).*

[2] In fact, the provisions of Bill 198 came into force on that date but, in addition, several regulatory changes were also made. These appear to have been made pursuant to the *Insurance Act* as it read before Bill 198 came into force. In this paper, I will distinguish between the regulatory and statutory amendments. However, given that they all came into force on the same date and for the sake of simplicity I will refer to these changes collectively as Bill 198.

Bills. If you need some historical context, then I would suggest that you review one of the earlier versions of this paper. I will simply refer to the current version of the legislation as AIRS.

The appendix contains a set of rules that can be followed to calculate damages under AIRS. Following these rules should assist you in avoiding mistakes but, unfortunately, these rules are complex. These rules only work if the assumptions contained in this paper about several nuanced interpretative issues are correct. Therefore, I would caution the reader to carefully assess the assumptions that I have made in each of the damage calculation rules before using them.

II. PROTECTED DEFENDANTS AND OTHER PERSONS

A. Introduction

AIRS divides defendants into two classes; namely, protected defendants and other persons. Before discussing how the damage calculation and apportionment provisions work, it is important to understand the distinction between these two types of defendants.

(i) Who are "Protected Defendants"?

AIRS defines a "protected defendant" as a person who is protected from liability under subsections 267.5(1), (3) and (5) of AIRS.[3] In later subsections, persons who are not "protected defendants" are simply described as "other persons". I will refer to them as "unprotected defendants".

In the previously referred-to subsections, the persons protected from liability are enumerated. They are:

(a) the owner of an automobile,

(b) the occupants of an automobile,[4] and

(c) any person present at the incident.

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[3]Section 267.3

[4]"Occupant" is defined as the driver of the automobile, a passenger whether being carried in or on the automobile and a person getting into or on or getting out of or off the automobile. See section 224(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 amended (hereinafter the "*Act*").

There is a great deal of case law on who is an “owner” of an automobile which I will not canvass in this paper. The term “owner” is also defined in section 267.3 of the *Insurance Act* to include a CVOR operator and, effective March 1, 2006, this definition has been expanded to include a lessee.[5]

Subsection 267.5(6) adds a very important qualification to the definition of a protected defendant. The effect of this subsection is to strip a protected defendant of this status if the person is defended by an insurer that is neither an Ontario automobile insurer nor has filed the requisite undertaking.[6]

This provision strips owners, occupants and persons present at the incident of their status as protected defendants if they are defended by the “wrong type” of insurer. They do not lose their status if they defend themselves.

A rare but interesting problem can arise for "persons present at the incident". Let us suppose a collision was partly caused by a bicyclist. The bicyclist’s home insurer would likely defend the action. In most cases, that insurer also underwrites automobile insurance in Ontario. Therefore, the bicyclist would be a “protected defendant”. However, there are a few insurers who underwrite

[5] See section 267.3

[6] Section 226.1 of the *Act* permits an insurer, which issues automobile policies in another province or U.S. state, to file an undertaking with the Financial Services Regulatory Authority of Ontario (FSRAO) obliging it to provide certain minimum mandatory coverages on any vehicle which it insures when such vehicle are operated in Ontario. The coverages which must be provided are minimum third party liability limits of $200,000.00, basic SAB benefits and $200,000.00 of uninsured motorist protection. Although mandatory in Ontario policies, the undertaking does not oblige insurers to provide direct compensation coverage (which will cease to be mandatory in 2024). Most American and Canadian insurers are providing these minimum coverages anyway. Extra-provincial insurers are often obliged to provide such minimum coverages by the laws of the jurisdiction which licensed them, by the so-called conformity provisions in their policies which require them to provide the minimum coverages mandated by the law of the jurisdiction in which the automobile is being operated or have undertaken to do so in the undertakings they have filed with the Superintendent of Financial Institutions for the Province of British Columbia (now administered by the Canadian Council of Insurance Regulators). See *Healy v. Interboro Mutual Indemnity Insurance Company* (2000) 138 O.A.C. 199 (note), 2000 CarswellOnt 1805, [1999] S.C.C.A. No. 384, [2000] 1 S.C.R. xiii Leave to appeal refused 119 O.A.C. 354, [1999] O.J. No. 1667, (Ont. C.A.); Affirmed (1998), [1999] I.L.R. I-3636, 1998 CarswellOnt 2142, 2 C.C.L.I. (3d) 281, 40 O.R. (3d) 270, 38 M.V.R. (3d) 57 (Ont. Gen. Div.) and cases referred to therein. I used to recommend that out of province insurers file this undertaking as there was probably no risk in doing so. However, the Court of Appeal decision in *Avis v. Certas*, 2005 CarswellOnt 7442, 215 O.A.C. 396 (note), Leave to appeal refused, 22 C.C.L.I. (4th) 1198, [2005] I.L. R. I-4413, 18 M.V.R. (5th) 61, 197 O.A.C. 214, 75 O.R. (3d) 421, 2005 CarswellOnt 1926 (Ont. C.A.); Affirmed, 18 M.V.R. (5th) 43, 71 O.R. (3d) 313, 13 C.C.L.I. (4th) 115, 2004 CarswellOnt 1876 (Ont. S.C.J.) suggests that the filing of this undertaking can have unintended consequences for such insurers if they write excess or umbrella automobile coverage.

homeowners' policies that are not licensed to undertake automobile insurance. A bicyclist defended by such an insurer would not be a "protected defendant". It does not appear that such insurers are entitled to file section 226.1 undertakings.[7]

The phrase "any person present at the incident" has not been interpreted broadly. It probably only includes natural persons who were actually present at the scene of the crash.[8]

Persons who are vicariously liable for the negligence of protected defendants are unprotected defendants but now their liability is no greater than that of the protected defendants. The most common situation will involve a driver who was in the course of his or her employment at the time of the crash.[9] This issue is discussed in further detail below.[10]

(ii) What are the Advantages of Being a Protected Defendant?

Protected defendants receive preferential treatment with respect to three heads of damage: Non-pecuniary general damages, income loss and loss of earning capacity claims and health care expenses. In addition, protected defendants are immune from tort claims advanced by uninsured plaintiffs.[11]

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[7] The so-called "protected defendant undertaking" which allows out of province auto insurers to opt into the Ontario tort reform scheme.

[8] *Harroun (Litigation Guardian of) v Turriff,* 2000 CarswellOnt 2889 (C.A.), *Zsoldos v. Canadian Pacific Railway* (2007) CarswellOnt 1511, 46 C.C.L.I. (4th) 294 (Ont. S.C.J.). See discussion at "Vicarious Liability" at II.Aii (e) below.

[9] *Vollick v. Sheard* (2005), 75 O.R. (3d) 621. Since October 1, 2003 the employer of a protected defendants has no greater liability than the employee (subsection 267.5(10.1). See also *MacKinnon v A.J. Bus Lines Ltd.* [2010] CarswellOnt 3213 at para. 33.

[10] See "Vicarious Liability" II.A.ii.e below.

[11] See section 267.6 which provides that a person cannot advance a tort claim for bodily injury or death if the person was contravening subsection 2(1) of the *Compulsory Automobile Insurance Act*. The Court of Appeal in *Hernandez v. 1206625 Ontario Inc.* (2002), 61 O.R. (3d) 584 concluded that this provision only prohibits actions against protected defendants.

(a) Non-Pecuniary General Damages

Non-pecuniary general damages and damages under the *Family Law Act*[12] for loss of care, guidance and companionship cannot be recovered against a protected defendant unless the injury satisfies the verbal threshold set forth in the legislation.[13] To recover such damages the victim must suffer a permanent, serious permanent disfigurement or a permanent serious impairment of a an important physical, mental or psychological function. This threshold is an amalgam of the tests set forth in previous legislation.[14] A protected defendant is only liable for non-pecuniary general damages or for loss of care, guidance and companionship claims if the injured party dies or suffers a threshold piercing injury. If the injury does not meet this threshold, then only an unprotected defendant would be obliged to pay non-pecuniary damages to the injured person or any *FLA* claimant. In addition, even if the injury does meet this threshold, section 267.5 provides for indexed deductibles from such damage awards.[15] Since Bill 34 came into force on September 1, 2010 these deductibles do not apply to the injured party or to FLA claimants if their damages exceed the indexed amounts.[16] Additionally, no deductible applies to FLA claimants in respect of a fatal injury[17]. These deductibles are only available to protected defendants.

It should also be noted that when Bill 198 came into force, Regulation 461/96 was amended to add provisions defining the elements of the threshold and how they must be proven.[18]

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[12] R.S.O. 1990, c. F.3 as amended [hereinafter the "*FLA*"]

[13] Subsection 267.5(5)

[14] The Court of Appeal in the leading decision of *Meyer Bright* 1993 CANLII 3389 has indicated that the phrase "threshold" is inappropriate. Nevertheless, most lawyers and many judges continue to use it. I have used it in this paper as the alternative phrase recommended by the Court of Appeal is cumbersome.

[15] As of October 1, 2023 the deductible for non-pecuniary loss is $44,367.24 and for *FLA* damages it is $22,183.63.18. See subsection 267.5(5) and O.Reg 461/96 section 5.1. The deductibles are published annually by FSRAO, usually, in December.

[16] As of October 1, 2023 they are $147,889.59 for non-pecuniary general damages and $73,944.18 for *FLA* damages.

[17] See subsection 267.5(8.1.1) of the *Act*.

[18] See sections 4.1 through 4.3. For a discussion of some of these rules see *MacKinnon v A.J. Bus Lines Ltd*, 2010 CarswellOnt 3213 and cases cited therein and *Adams v Taylor*, 2013 ONSC 7920. This is not an exhaustive list of the cases which discuss this regulation.

(b) Income Loss or Loss of Earning Capacity Claims

Protected defendants are not liable for income loss or loss of earning capacity (collectively "loss of income") claims suffered in the first seven days following the crash. Also, they are not liable for more than 70% of any gross loss of income suffered after the first seven days and prior to trial.[19] After the trial commences, the liability of both protected and unprotected defendants is 100% of the future gross loss of income.

Subsection 267.5(2) purports to make the same rules applicable to claims made pursuant to subsection 61(1) of the *FLA*. Technically, however, claims made pursuant to the *FLA* in fatality cases are for loss of dependence, rather than for loss of income. While the intent of the legislation is to apply the same rules to loss of dependency claims, the language used in the legislation may not have accomplished this goal.[20]

Protected defendants are also given a partial priority with respect to the deduction of loss of income collateral benefits. These collateral benefits are deducted first from the damages that protected and unprotected defendants are jointly and severally liable to contribute to. If there are any past losses left after this deduction, then the remaining collateral benefits are deducted from the damages that the unprotected defendants are solely liable for. This priority only applies to past losses and not to future losses.[21]

[19]See O. Reg. 461/96 for definitions that apply to subsection 267.5(1). Prior to September 1, 2010, this figure was 80% of net income rather than 70% of gross income.

[20] Frankly, O. Reg 416/96 should have set out rules for the calculation of loss of dependency under the *FLA*. This omission could support an argument that the court must ignore this subsection for fatality claims, as there is no formula provided to calculate such losses. Even if the loss of income formula in the regulation were used, plaintiffs could be over-compensated. It should also be noted that there are problems with the regulatory formula if a self-employed individual has ongoing business expenses or the plaintiff is on a pension. Further, there can be no gross-up for future loss of income claims with the exception of claims made under subsection 61(1) of the *FLA*. (see section 267.11)

[21] See subsections 267.8(1) and (3). As will be discussed later, (see the discussion under the heading "Collateral Benefits" III.C.iv.a below) certain interpretations of the *Sullivan Estate* decision may strip this provision of any vitality.

(c) Health Care Expenses

Protected defendants are only liable for health care expenses if the injury pierces the verbal threshold.[22] Unprotected defendants are liable for health care expenses even if the injury does not pierce the threshold.

(d) OHIP and Subrogated Claims

There is no convenient place to discuss this topic, so I will comment on it here. Subsection 267.8(17) strips anyone who has paid collateral benefits of their common law, statutory or contractual rights of subrogation. Subsection 267.8(18) carves out an exception for OHIP, but only as against a person who is not insured under a motor vehicle liability policy issued in Ontario.[23]

Automobile insurers licensed in Ontario are assessed annually for the estimated costs OHIP incurs due to the negligence of their insureds.[24] The intent of subsection 267.8(18) was to ensure that OHIP would be entitled to subrogate against everyone else. One would presume that this permits OHIP to pursue subrogated claims against all unprotected defendants and a number of persons who would qualify as protected defendants but whose insurers are not assessed annually. The latter would include persons present at the incident, uninsured drivers and owners and any person insured by an out of province automobile insurer which has filed a section 226.1 undertaking.

Accordingly, and given the above presumption, one would expect that OHIP should be entitled to recover all sums it pays out as a result of automobile crashes that occur in Ontario. The mechanism of recovery would differ depending on whether the person at fault is or is not insured under a motor vehicle liability policy issued in Ontario.

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[22] Subsection 267.5(3).

[23] It is clear that the exception to the prohibition on subrogation in favour of OHIP is limited to OHIP. Other provincial health insurance plans cannot subrogate. See *Matt (Litigation Guardian of) v. Barber* (2002), 216 O.A.C. 34 (C.A.), *Landry v. Roy* (2001), 55 O.R. (3d) 605; and *Meady v. Greyhound Canada Transportation Corp.*, 2012 ONSC 657 at para 254.

[24] See O. Reg. 401/96

Unfortunately, this interpretive approach to subsection 267.8(18) was rejected by the Court of Appeal. The Court of Appeal has concluded that if a defendant is insured under the requisite type of policy, even if that is not the policy that is obliged to respond to the claim, then the defendant is immune from a subrogated claim by OHIP.[25] For example, if a tavern owns a car or, possibly, if it has a non-owned automobile endorsement on its CGL policy, then it cannot be called upon to reimburse OHIP. Frankly, this interpretation destroys the entire logic behind OHIP's subrogation rights. Following this decision, OHIP can only subrogate against non-residents and people who are not insured under any type of motor vehicle liability policy issued in Ontario.

There is nothing in AIRS that specifically describes how OHIP's claim would be calculated. In situations where there is a mix of defendants, some of whom OHIP is permitted to sue and some whom it is not permitted to sue, it would be reasonable to treat the latter group as having paid their proportionate share of OHIP's claim through the mandatory assessment mechanism.[26] This should leave the defendants, against whom OHIP is entitled to subrogate, jointly and severally liable, as between themselves, for only that portion of the damages they caused as determined under the *Negligence Act*.

Subsection 267.8(17) of AIRS prohibits subrogation by anyone who has paid collateral benefits other than OHIP. As the result of the Court of Appeal's ruling in the *Wawanesa* case any doubt that this provision applied to unprotected defendants has been laid to rest.[27]

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[25] *Georgiou v. Scarborough (City)* [2002] O.J. No. 3335. The Supreme Court of Canada refused leave to appeal this decision.

[26] This argument was more attractive before the Court of Appeal decision in *Georgiou*. Now it will be more difficult to argue that a contribution has been made on behalf of a defendant to OHIP if the defendant is not defending the claim under a motor vehicle liability policy issued in Ontario.

[27] *Wawanesa Mutual Insurance Company v. O.P.P.* (2002), 212 D.L.R. (4th) 191 (C.A.) affirming 54 O.R. (3d) 112 (Divisional Court) reversing 47 O.R. (3d) 332 (per Kozak J.). There appears to be a conflict between this case and the later Court of Appeal decision in *Hernandez* (see footnote 11). *Wawanesa* is not referred to by the Court in *Hernandez.* For an interesting analysis of the scope of the phrase "arising directly or indirectly out of the use or operation of an automobile" see the decision of Boyko J. in *Scanes v. Datillo* (2003), 65 O.R. (3d) 768. All cases which turn on the meaning of the phrase "arising directly or indirectly out of the use or operation of an automobile" as do the above cited cases may require reconsideration in light of the Supreme Court of Canada decisions in *Citadel General Assurance Co. v. Vytlingam*, 2007 CarswellOnt 6626 and *Herbison v. Lumberman's Mutual Casualty Co.*, 2007 CarswellOnt 6628. However, to date I have not reviewed a decision that has discussed these cases in respect to the issues raised in the *Wawanesa*In or *Hernandez* decisions. In my view, the result in *Wawanesa* should not be changed by these decisions.

(e) Vicarious Liability

Prior to the enactment of AIRS, the Court of Appeal had concluded that those who employed protected defendants were not themselves protected defendants. This resulted in the employer of a protected defendant, who may have also been the owner of the vehicle involved in the collision, being obliged to pay those damages which the driver/employee was excused from paying under Bill 59.[28] In other words, in their capacity as employers they were not considered protected defendants even if they owned the involved automobile. As a result, when Bill 198 was enacted the following subsection [267.5(10.1)] was added:

> Despite any provision of this Part, a person vicariously liable for the fault or negligence of a protected defendant is not, in respect of the person's vicarious liability, liable for any amount greater than the amount of damages for which the protected defendant is liable.

The effect of this provision is to turn a person who is vicariously liable for the actions of a protected defendant into a pseudo "protected defendant". The result is that the vicariously liable person is never liable for more damages than the protected defendant. To put it somewhat differently, a vicariously liable defendant will be obliged to pay precisely the same damages as the protected defendant. The most common situation where this provision will apply will be where the employer of an at-fault driver is sued. This provision, however, does not extend to the liability of that person for his or her own independent negligence.

An anomalous situation can arise because vicariously liable persons are not actually "protected defendants". Protected defendants lose their protected status if they are defended by an insurer which is not licensed to undertake automobile insurance in Ontario or which has not filed a protected defendant undertaking. These requirements do not apply to the vicariously liable person. This could be significant in, at least, one situation:

If an out of province driver operates a car rented in Ontario, then the driver will probably be defended by the rental car company's insurer. Both the driver and the rental car company will be

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[28] See footnote 9. See also *MacKinnon v. A.J. Bus Lines Ltd.*, 2010 CarswellOnt 3213 at para 33.

protected defendants. However, the employer may well be defended under a non-owned automobile endorsement issued by an extra-provincial insurer, which is not licensed to undertake automobile insurance in Ontario. Nevertheless, the employer's exposure cannot be any greater than its employee's.

(f) Vanishing Deductibles

Bills 198 created vanishing deductibles.[29] If the injured plaintiff's general damages are assessed in excess of the indexed amount, then no deductible is applied. Similarly, if an *FLA* claimant's damages for loss of care, guidance and companionship are assessed in excess of the indexed amount, then no deductible is applied. It is important to note that the assessments must exceed, not equal, the indexed amounts for the deductibles to "vanish". Bill 34 has removed deductibles for fatal accidents occurring after August 31, 2010.[30]

(g) Non-collision Events and Public Transit Vehicles

As of May 12, 2011, the owner or driver of a public transit vehicle, which is a defined term, is not entitled to the benefit of the income loss, health care expense, threshold provisions or the deductibles unless the public transit vehicle was involved in a collision with another vehicle or object.[31] The claimant is also not entitled to receive Statutory Accident Benefits.

This provision was clearly intended to force transit passengers in non-collision incidents to pursue pure tort remedies rather than accident benefits. This would apply to injuries sustained because of sudden starts or stops of transit vehicles.[32]

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[29] See subsections 267.5 (8) and (8.1).

[30] Subsection 267.5(8.1.1)

[31] See subjection 267.5(6.1)

[32] Quaere whether driving over a pothole would be considered to be a collision with an object (the bottom of the pothole).

B. Collateral Benefits

AIRS specifically provides for the deduction of many collateral benefit payments which are received or were available to the plaintiff before trial and that were paid in respect of the incident. This statutory deduction of collateral benefits, which is detailed in section 267.8 of AIRS, permits all defendants in actions arising directly or indirectly out of the use or operation of an automobile to deduct a wider variety of collateral benefits than could be deducted at common law.[33] There are three deduction provisions. Subsection 267.8(1) deals with income and income replacement benefits, subsection 267.8(4) with health care benefits and subsection 267.8(6) with other pecuniary benefits.

Subsection 267.8(2) provides that collateral benefit payments made in respect of any loss of income in the first seven days after the accident are not deductible. Subsection 267.8(3) provides that protected defendants have a priority with respect to the deduction of such benefits.[34]

Similar provisions apply to future benefits. However, in the case of future benefits there are no deductions but an assignment or a trust created wherein such future benefits are transferred to the defendant(s) as they are received.

The Matching Principle

How these deduction and trust provisions work has been partly clarified by a series of Ontario Court of Appeal decisions.[35] The Court described the deductibility provisions as creating 3 silos

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[33] *John v. Flynn* (2001), 54 O.R. (3d) 774 (C.A.), leave to appeal dismissed [2001] S.C.C.A. No. 394, holds that all defendants are entitled to the collateral benefits deductions under the OMPP. The Court of Appeal's reasons for dismissing the appeal in *Wawanesa v. OPP* strongly suggest that the same is true under Bill 198. See also *Burhoe v Mohammed* 2008 CarswellOnt 9052 (per Wein J.) However, Ontario Disability Support Program payments may not be deductible. See *Moss .v Hutchinson* (2007), 48 C.C.L.I (4th) 265, 2007 CarswellOnt 2779 (Ont. S.C.J. per Howden J.) In part, the Court's decision in *Moss* was founded upon applying the principle of statutory interpretation that the provisions of a general statute must yield to those of a specific one. The Court held that the provisions of *Insurance Act* must yield to those of the *ODSP Act*. O'Connor J reached the opposite conclusion with respect to CCAC payments in *Osborne (Litigation Guardian of) v. Bruce (County)*, 39 M.V.R. (3d) 1198, where the Court had held that the *Insurance Act* was specific legislation and that *Long-Term Care Act* and the *Ministry of Community and Social Services Act* were general legislation that must yield to it. I find O'Connor J.'s reasoning more persuasive.

[34] I believe that this section may actually have been rendered moot if the approach I commend for apportioning damages is adopted. See discussion under the heading "Collateral Benefits" at III.C.iv.a below.

[35] *El-Khodr v Lackie* 2017 CarswellOnt 14483, *Cadieux v Cloutier* 2018 CarwellOnt 202777, *Cobb v Long Estate* 2017 CarswellOnt 14441 and *Carroll v McEwan* 2018 CarwellOnt 20280.

(loss of income, health care expenses and other pecuniary losses) for the deduction of collateral benefits. If a claim falls into one of those silos, then any collateral benefits received by the plaintiff, that the plaintiff was entitled to receive or is receivable in the future that fall within the same silo will be deducted (or assigned in the case of future benefits) regardless of whether the benefit strictly matches the head of damages. This allows for the cross deductibility of benefits that fall into, for example, the health care silo from damages that fall into the same health care silo regardless of whether the benefit is for the exact same expense.[36] The former approach of only allowing deductibility if the expense exactly matched the benefit received has been replaced by this approach which is, according to the Court, mandated by the language of the provisions and a Supreme Court of Canada decision.[37]

However, these decisions have confused an issue regarding the deductibility of certain health care collateral benefits. They mandate that plaintiffs present their cases in a manner which lumps together claims that fall into each of the 3 silos to permit the easy deduction of collateral benefits that fall within the same silos. If the Court had stopped at this point, then most of the deductibility problems would have been solved. However, the Court went on to say that if there was an expense that fell within one of these silos which lacked a matching SABS benefit, then this claim should be set out separately. This suggests that SABs or other collateral benefits are not to be deducted from an expense that does not have a matching benefit. If this is, in fact, what the Court is suggesting, then this could lead to real confusion regarding whether you can deduct collateral benefits from expenses that are not reimbursed in part by those collateral benefits.[38]

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[36] This can be important in a few situations but most often where there is contributory negligence. Let us assume that the plaintiff is 50% contributorily negligent. He incurs past health care expenses of $100,000 of which $75,000 are for drugs and $25,000 is for physiotherapy. Additionally, he receives SABs totalling $50,000 for drugs and nothing for physiotherapy. After contributory negligence is considered, the silo of health care damages totals $50,000 of which $37,500 is for drugs and $12,500 if for physiotherapy. The SABS received for drug expenses of $50,000 wipe out the entire health care claim by deducting drug benefits not only from the drug claim but also from the other health claim for physiotherapy.

[37] See discussion in *El-Khodr op cit.* footnote 35, *Basandra v Sforza* 2016 CarswellOnt 5140 (C.A.) and *Gurniak v Nordquist* (2003, SCC 59.

[38] For example, if the plaintiff incurred attendant care expenses but there are no collateral benefits that reimburse for attendant care expenses, can the collateral benefits be deducted from such expenses.

This suggestion undoes some of the clarity that these cases seemed to have brought to the deductibility of collateral benefits.[39]

This matching principle means that it is the net benefit received from the payor of collateral benefits which the defendant is entitled to deduct or receive in the future. For example, if the plaintiff's LTD benefits are taxable, then it is the net after-tax payment that the defendant is entitled to deduct from past claims or the plaintiff is obliged to hold in trust for future claims.[40]

Other Deductibility Issues

Whether the legal fees incurred to obtain the payment of a collateral benefit are deductible depends on the facts of the case. The factors that must be taken into consideration are discussed in detail in the *Cadieux* decision.[41]

Non-Earner Benefits are not considered benefits in respect of loss of income. Accordingly, they are not deductible from either a past or future loss of income claims.[42]

The Court of Appeal's decision in *Cugliari v.White*[43] made it clear that a similarly, but not identically worded provision in the OMPP, limited collateral benefit deductibility for loss of income to those that are considered indemnity payments. As a result, CPP Disability Benefits were found not to be deductible from loss of income claims under the OMPP. The question of deductibility was clarified under AIRS by the Court of Appeal in the *Demers* decision in 2012.[44] In that case, Justice Laskin, writing for the Court, concluded that it would take clear legislative

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[39] In the *El-Khodr* case the consideration was only for the deductibility of SABS and there were no expenses for which SABS benefits were not available. However, the Court suggested that if, for example, there were transportation expenses and the SABS did not provide any transportation expense benefits, then those expenses should be calculated separately presumably so that SABS would not be deducted against such expense. This seems to undo the admonition that all benefits which fall within the silo should be deducted from all claims which fall within the same silo.

[40] *Nemchin v Green* 2021 CarswellOnt 5226 (C.A.)

[41] *Cadieux v Cloutier, op cit* footnote 35

[42] See *Kolapully v TTC* 2022 CarswellOnt 15275 (per P.T. Sugunasiri J.)

[43] (1998), 38 O.R. (3d) 641 (C.A.); leave to appeal refused 120 O.A.C. 198 (note).

[44] *Demers v B.R. Davidson Mining & Developments Ltd.* 2012 ONCA 384

language to displace the common law rule that private insurance payments are not deductible from tort damages. The Court concluded that both CPP and a private pension plan did not compensate the plaintiff for her loss of income or earning capacity, but rather for her disability. Additionally, as they were not paid in respect of the incident, they were not deductible under the express wording of the section. This case arose out of an accident that pre-dated Bill 198. Regulations which apply to accidents occurring on or after October 1, 2003 specifically provide that CPP Disability Benefits and most group employers' LTD plans are deductible.[45] It now appears that most private LTD plan benefits will not be deductible. Additionally, union pension benefits that can be claimed early because of disability are non-deductible.[46]

The Court of Appeal appears to have approved of a decision which concluded income replacement benefits should not be assigned after the date of the plaintiff's retirement.[47]

If the plaintiff is entitled to drug benefits after age 65 under the Ontario Drug Benefit Program, then the defendant should not be held liable to pay any covered drug costs after the plaintiff turns 65.[48]

The legislation specifically prohibits the deduction of collateral benefits from any award for non-pecuniary loss.[49] This prohibition applies both to payments received and to payments the plaintiff is entitled to receive. Given the Court of Appeal's characterization of awards for loss of care,

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[45] See section 5.2 of O.Reg 461/96 as amended.

[46] See *Finnemore v Hyde* 2021 CarswellOnt 26 (per Spencer Nicholson J.); Further amendments were made to the regulation effective September 1, 2010 by adding subsection 5.1(2) providing for the deduction of benefits received under a loss of income or income continuation plan described in subsection 3(7) of the SABs Schedule.

[47] *El-Khodr v Lackie, op. cit.* footnote 35 apparently approving the result in *Baillargeon v Murray* 2001 CarswellOnt 148 (per Henderson J.) without mentioning that decision. The discussion in this case makes clear that that only where the plaintiff will receive double recovery should deductions be made.

[48] *Ibid, El-Khodr v Lackie,*

[49] Subsection 267.8(6)

guidance and companionship as essentially non-pecuniary in nature, it follows that death benefits paid under the SABs Schedule are not deductible from such awards.[50]

It is not uncommon for claims for loss of income to be put forward by *FLA* claimants who have provided nursing or attendant care to the injured plaintiff. One case concludes that the amounts recovered in respect of the provision of such services from the SABs insurer are not deductible from the *FLA* pecuniary loss award.[51] Relying on section 63 of the *FLA*, which prohibits the deduction of amounts paid or payable as a result of injury or death under a policy of insurance, Justice D. S. Ferguson refused to reduce the wife's income loss claim by the amount that her husband was alleged to have received for attendant care benefits.

Subsections 267.8(21) and (22) define "available" for the purposes of subsections (1), (4) and (6). A payment is considered to be available, even if not received, if the plaintiff failed to apply for it, failed to submit to any examination required by law or settled his or her claim in bad faith.[52] A payment is deemed not to be available under subsection 267.8(21) if the plaintiff's application was denied.

Since these sections are tied specifically to subsections 267.8(1), (4) and (6), they should only apply to pre-trial collateral benefits.[53] This implies that a plaintiff, who fails to recover benefits he or she was entitled to or makes a settlement in "bad faith", will only be penalized until trial. This is consistent with the wording of subsection 9, which creates a trust in respect of future collateral benefits. It only applies to payments the plaintiff "receives" after trial and not to

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[50] *MacCartney v. Islic* (2000), 46 O.R. (3d) 669 (C.A.). See also *DiGirolamo v. Smolen*, [2002] O.J. No. 1526, 59 O.R. (3d) 357 and *Wright (Litigation Guardian of) v. Hannon*, 2007 CarswellOnt 4114, (Ont. S.C.J.),

[51] *Cantlon v. Timmins (City)*, [2006] O.J. 1918 (Ont. S.C.) (2006), 33 M.V.R. (5th) 198 ()

[52] According to at least two cases an improvident settlement is not necessarily a settlement made in bad faith. See *Peloso v 778561 Ontario Inc.* 2005 CarswellOnt 2480 and *Vanderkop v. Personal Insurance Co. of Canada* 2008 CarswellOnt 2761.

[53] See *Hornick v Kochinsky* 2005 CarswellOnt 1589. The decision of Henderson J. in *Baillargeon v.Murray* (2001), 52 O.R. (3d) 278 reaches very different conclusions on this issue, but this case is was decided under the OMPP which has a differently worded provision.

payments that the plaintiff is entitled to or that were "available".[54] However, just to confuse matters further, the assignment of future collateral benefits provision in subsection 12 refers to payments that the plaintiff is "entitled" to in respect of the incident after the trial. Given this confusion and the principle of preventing double recovery under the legislation, I would not be surprised if the courts eventually conclude that the future claims should be reduced on account of the collateral benefits which were available. However, if this is not the path the courts take, then it is incumbent on plaintiff's counsel to ensure that cases are tried quickly where the plaintiff has failed to apply for collateral benefits or has entered into, an arguably, "bad faith" settlement.

If the plaintiff settles a collateral benefits claim in "bad faith," then the payment would also be considered to be available and could be deducted. Justice Greer in *Morrison v. Gravina*[55] held that "bad faith" implies more than negligence or bad judgment. There must be intent to act with ill will or an improper or illegal design. If this provision applies to future collateral benefits, then it would appear that the claim would be reduced by the actual present value of the future benefits rather than by an amount which would represent a "good faith" settlement of the future claim.[56]

Hugh Brown and Derek Abreu have identified another potential problem with respect to the treatment of future collateral benefits. If the future benefits are simply divided amongst the defendants in accordance with the apportionment of fault, then this could result in an inequitable division. For example, if the injury does not pierce the threshold, the protected defendant will not be held liable for paying any future health care expenses. Accordingly, it would be unfair for a protected defendant to receive any of the future health care collateral benefits. They should all be paid to the unprotected defendant. As Messrs. Brown and Abeu point out in their paper

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[54] See *Peloso v. 775861 Ont. Inc., op. cit.* footnote 52 at paragraphs 438-444 which has adopted this approach to the interpretation of section 267.8.

[55] *Morrison v. Gravina*, [2001] O.J. No. 2060 (S.C.J.), followed in *Nielson v. Darcis*, 2010 ONSC 6402 and *Morris v Prince* 2023 CarswellOnt 10525.

[56] See *Collee v. Kyriacou* (1996), 31 O.R. (3d) 558 (Gen. Div.). This case was decided under the OMPP where the test was not bad faith but improvidence.

unprotected defendants facing this situation should request that an assignment order be made with terms which reflect this reality.[57]

If the settlement reached with either the SABS insurer or a third party benefits payor indicates that the settlement was intended to settle the claim for SABS or a specific collateral benefit described in subsections 267.8(1), (4) or (6), then the payment will be deductible. However, if the documentation fails to indicate that this was the basis for settlement, then the settlement may not be deductible as there will be a lack of evidence that it was payment of a benefit described in those subsections.[58]

There are a number of additional issues surrounding the deductibility of collateral benefits. They will be discussed at appropriate points in this paper.

C. Leased Vehicles

Expanding the definition of "owner" under the *Insurance Act* to include a lessee has made lessees vicariously liable for the negligent operation of a rented or leased vehicle. The amendments to the *Insurance Act*, as well as to the *Compulsory Automobile Insurance Act* and the *Highway Traffic Act*, took effect on March 1, 2006. These amendments were intended to accomplish several goals. The critical change was to make lessees or renters liable for the negligent operation of their leased or rented vehicles. This had not previously been the law. Second, they limit the vicarious liability of lessors for bodily injury and death claims to $1 million less any insurance that is available from the lessees' and the operators' policies. Finally, the priority of payment rules for the insurers of lessors, lessees and operators were changed. [59]

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[57] . Hugh G. Brown and Derek Abreu, **Unprotected and Protected Defendants: the Effects on Litigation Strategy**, Auto Insurance Litigation Claims, The Canadian Institute, September 30 and October 1, 2002.

[58] See *Anand v Belanger* 2010 CarswellOnt 7200 (per Stinson J.) where the trial judge did deduct the SABs settlement but not the settlement with the LTD carrier. See also *Mikolic v Tanguay* 2016 CarswellOnt 11 (Divisional Court)

[59] See section 277

The owner, lessee and operator are jointly and severally liable for the negligent operation of the motor vehicle.[60] This change applies not only to long term leases but also to short term rentals.[61]

Changes to the *Insurance Act* provide that the liability of the lessor for personal injury and death claims is limited to $1,000,000 less any amounts:[62]

> that are recovered for loss or damage from bodily injury or death under the third party liability provisions of contracts evidenced by motor vehicle liability policies *issued to persons other than a lessor* (emphasis added)

The intent of this provision is to limit the lessor's liability to $1 million less an insurance available to the lessee and/or the driver.

These limitations on liability only apply to bodily injury and death claims. Therefore, if a lessee takes out a bridge causing $3 million damage, the lessor is still liable for the entire loss. Additionally, these limitations relate only to the lessor's vicarious liability under the *Highway Traffic Act*. If the lessor has itself acted negligently, then the lessor's liability for such negligence is not affected by these amendments.

For the purpose of calculating damages under AIRS after March 1, 2006, the lessee is a protected defendant. Prior to that date a lessee had no vicarious liability and could only be sued for his or her negligence. The lessee was not considered to be a protected defendant prior to March 1, 2006.

These provisions are complicated, and several policies and endorsements have been issued by the FSRAO to specifically address many of the issues raised by this legislation. A detailed discussion of these provisions is beyond the scope of this paper.[63]

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[60] See section 192 of the *Highway Traffic Act*. While it seems clear that the liability to the plaintiff is joint and several the legislation says nothing regarding the nature of the liability as amongst these three types of defendants.

[61] The term lessee includes a person who rents or leases a vehicle for any period of time. See section 192 of the *Highway Act*.

[62] The amount can be changed by regulation and is subject to minimum insurance limits prescribed pursuant to other legislation. For example, the lessor of a large bus would be liable for up to $8 million as this amount is required under the provisions of the *Public Vehicles Act*.

III. CALCULATING DAMAGES UNDER AIRS

A. Introduction

The major problems in calculating damages under AIRS arise in situations where there is a mixture of protected and unprotected defendants. The apportionment provisions, which are set out in section 267.7, are complicated. Where the only defendants are "protected" the calculations are much simpler. I will first discuss an example involving only a protected defendant. I will then modify this example to include both types of defendants. However, before turning to the examples, there are some additional matters that require discussion.

(i) Separate Calculation of Each Head of Damages

Subsection 267.7(2) specifically obliges the court to calculate the following heads of damages separately if there is a mix of protected and unprotected defendants:

- (a) loss of income;
- (b) health care expenses;
- (c) other pecuniary losses; and
- (d) non-pecuniary losses including *FLA* claims for loss of care, guidance and companionship.

This approach is necessary for several reasons. First, collateral benefits are to be deducted using the silo approach. In other words, there is to be no cross deductibility of pre-trial collateral benefits.[64]

Collateral benefits that were received or were available before trial are to be deducted from the combined past and future loss of income and loss of earning capacity claims.[65] This makes it clear that benefits received or to which the plaintiff was entitled before trial can reduce both their

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[63] Please see my previously published papers on this topic.

[64] With respect to cross-deductibility of future collateral benefits see "Other Pecuniary Losses" at III.B.iii

[65] *Cobb v Long Estate, op cit* footnote 35.

past and future loss of income or loss of earning capacity claims. This reasoning also applies to future health care and other pecuniary losses. [66]

Nevertheless, you will need to undertake separate calculations for past and future losses. This follows from the fact that the law for assessing such claims is different.[67] Second, only past losses attract prejudgment interest.

(ii) The Calculation Date

The legislation uses the phrase "before the trial" to divide past and future loss of income claims.[68] Presumably “before the trial" means before the commencement of the trial. For pre-judgment interest calculations, the relevant date is the date of judgment. In short trials, this difference will be of little practical importance. However, where the judgment is delivered long after the trial commences, then one calculation will have to be made for the purposes of AIRS and a second for prejudgement interest purpose.

B. All Defendants Are Protected

For the following discussion let us use the following fact situation:

a) the injured plaintiff's claim surpasses the verbal threshold and non-pecuniary damages are assessed at $100,000.00;

b) the plaintiff's wife's *FLA* loss of care, guidance and companionship claim is assessed at common law at $30,000.00;

c) the son's *FLA* loss of care, guidance and companionship claim is assessed at common law at $5,000.00;

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[66] It appears that the drafters did not consider the possibility that some past collateral benefits might still be available to reduce future loss of income claims.

[67] Past losses must be proved on the balance of probabilities whereas the onus is lower to prove a future economic loss.

[68] Clauses 267.5(1) 2 and 3.

d) the injured plaintiff was earning $2,000.00 per week gross at the time of the crash;

e) 70% of the injured plaintiff's gross loss of income is $1,400.00 per week;

f) after the crash the injured plaintiff receives private disability payments of $200.00 per week; from the date of the accident;

g) he receives $400.00 per week in income replacement SABs under the Statutory Accident Benefits Schedule from his automobile insurer commencing after 7 days have elapsed since the accident;

h) the injured plaintiff incurs $10,000.00 in health care expenses in the year following the crash;

i) the injured plaintiff receives $7,500.00 in collateral health care benefits;

j) the trial occurs one year after the crash;

k) the court concludes that the plaintiff will be able to return to his old job one year after the trial (it is anticipated that his loss of income collateral benefits will continue to be paid); and

l) the protected defendants are 100% at fault for the crash.

(i) Loss of Income and Loss of Earning Capacity Claims

The injured plaintiff is not entitled to any loss of income claim for the seven days following the crash. The injured plaintiff is also not entitled to receive more than 70% of his gross loss of income in the period commencing eight days after the crash and ending at the commencement of the trial. In this example the injured plaintiff is entitled to 70% of his gross loss of income for a period of 51 weeks ($1,400.00 per week x 51 weeks), or $71,400.00.

The next step is to reduce the claim for contributory negligence.[69] Presumably the reduction is based on the percentage of the recoverable loss of income rather than the gross loss of income. In our example, the gross loss of income is $104,000.00 (52 weeks x $2,000.00 per week). If this presumption is correct and the contributory negligence was assessed at 10%, then the reduction would be 10% of $71,400.00 rather than 10% of $104,000.00 or $64,260.[70] In the current example, the injured plaintiff is not contributorily negligent, so there is no deduction to make.

Added to this loss is the gross loss of income for the year following the trial or $104,000 bringing the total loss of income claim to $175,400.

The collateral benefits are deducted next. In this case the injured plaintiff received SABs of $400.00 for 51 weeks and private disability payments of $200.00 per week for 52 weeks. Subsection 267.8(2) provides that any collateral benefits referable to a loss of income suffered in the first seven days after the crash shall not be deducted. Accordingly, $600.00 per week for 51 weeks ($30,600.00) must be subtracted from the $175,400 figure calculated above. This reduces the plaintiff's net recovery to $144,800.

(ii) Health Care Expenses

Since the injury pierces the threshold the plaintiff can recover health care expenses from the protected defendant.[71] If the injury had not pierced the threshold, then the plaintiff would not be

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[69] Subsection 267.8(8) provides that reductions for contributory negligence shall be made before collateral benefits are deducted. See also *Gos v. Nicholson* (1999), 46 O.R. (3d) 212 (C.A.).

[70] The effect of subsection 267.5(1) is not to reduce the damages but, rather, to render the protected defendant "...not liable ...for the following damages..." Arguably the full damages still exist but the protected defendant is not liable for part of them. The effect of section 3 of the *Negligence Act* is to apportion the "damages" on the basis of the comparative negligence of the parties. This suggests that the court should deduct 10% of the full damages rather than 10% of the damages for which the protected defendant is liable pursuant to subsection 267.5(1). There are, of course, contrary arguments and I suspect that these will prove to be more attractive to the courts.

[71] *Briggs v. Maybee* (2001), 53 O.R. (3d) 368 (per Belch J.) has held that future housekeeping and home maintenance expenses are not health care expenses and may be recovered from a protected defendant. *Morrision v. Gravina*, [2001] O.J. No. 1208 (per Greer J.), is not entirely consistent with this viewpoint. Both cases are discussed in *Hunt (Litigation Guardian of) v. Martin* (2002), 40 C.C.L.I (3d) 75 (Ontario Superior Court). See also *Sabourin v Dominion of Canada General Insurance Co.* [2009] OJ 1425

entitled to recover such expenses from the protected defendant.[72] An unprotected defendant would be, at least, partially liable for such expenses regardless of the seriousness of the injuries.

In our example, the defendants are liable for $2,500.00; the difference between the health care expenses of $10,000.00 and the collateral health care benefits of $7,500.00.[73]

(iii) Other Pecuniary Losses

The protected defendant is liable for all other pecuniary losses. All pecuniary losses which are not loss of income, loss of earning capacity or health care expenses are lumped together and from them are deducted all collateral benefits which are not for loss of income or health care expenses. Beyond that, no matching of expenses to benefits is required.

(iv) Future Collateral Benefits

It must be kept in mind that protected defendants lose their partial priority with regards to the deduction of loss of income and loss of earning capacity collateral benefits once the trial starts.[74]

The legislation treats future collateral benefits differently from pre-trial collateral benefits. In direct contrast to the OMPP, AIRS requires the plaintiff to assign or hold any future collateral benefits in trust for the defendants.[75] While this system is more equitable to plaintiffs than the OMPP, it does create some unique problems.

First, if the future collateral benefits cannot be commuted at the end of the trial, then the tort insurer must keep its file open indefinitely. The file will remain open until the benefits cease to be paid.

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[72] See *Henderson v. Parker* (1998), 42 O.R. (3d) 462 and *Folmer v. Graham*, [2000] O.J. No. 2699 affm'd [2001] O.J. No. 1868 (C.A.). The Court of Appeal has also ruled that accident benefits are not payable for treatment that occurs after the expiration of the 10 year time limit in the SABs Schedule. See *Hope v. Canadian General* (2002), 212 D.L.R. (4th) 247 and also *Gottwald v. State Farm Automobile Insurance Co.*, 2007 CarswellOnt 5375.

[73] Although not relevant to this example, you must keep in mind that expenses for which there are no corresponding collateral benefits may need to be calculated separately. See the discussion at footnote 39.

[74] As previously discussed, subsection 267.8(3) may be of no practical importance if my method for calculating the division of damages amongst a mix of protected and unprotected defendants is correct.

[75] Although future collateral benefits are held in trust and are not "deducted", I will use this rather imprecise term to describe the trust mechanisms.

Second, the collateral benefits may be deductible from the entire damage award or the entire award save the non-pecuniary general damages.[76] The legislation goes to some lengths to ensure that there is no cross-deductibility of pre-trial collateral benefits. However, subsection 267.8(9) appears to drop this approach for future collateral benefits. Once a plaintiff recovers an award for any pecuniary loss, the plaintiff is obliged to hold all manner of future collateral benefits in trust for the defendant. I do not believe this issue has been resolved by the flurry of Court of Appeal decisions in 2017 and 2018.[77] However, if plaintiff's counsel is able to identify these types of problems at the time of judgment, there is a reasonably good chance that they can convince the trial judge to craft an assignment order that ensures that improper deductibility does not occur.

A literal reading of this section would permit the defendant to continue to receive future collateral benefits even if they exceed the damages awarded at trial. In the current example, the trial judge found that the plaintiff will be able to return to work one year after the trial. He continues to receive SABs and private disability benefits of $600.00 per week after the trial and dutifully remits them to the defendant's insurer. However, one year after trial it is determined that the plaintiff cannot return to work because his condition has not improved. If subsection 267.8(9) is interpreted literally, then the plaintiff must continue to remit his loss of income collateral benefits to the defendant's insurer, notwithstanding his continuing disability. Even after the entire judgment is reduced to zero, the plaintiff is obliged to remit the collateral benefits to the defendant's insurer. Eventually, the defendant's insurer could turn a profit on the litigation.

[76] Subsection 267.8(7) prohibits the deduction of collateral benefits the plaintiff has received or is entitled to receive from the non-pecuniary damages award. However, this subsection appears to deal only with pre-trial collateral benefits. Depending on whether "entitled to receive" speaks to past benefits or to past and future benefits, this provision may prohibit the deduction of past benefits or past and future benefits. If it is the former, then the problem discussed in the next paragraph is a real one. If it is the latter, then this may be a partial check on deductibility. One could argue that once deductibility would begin to effectively reduce the non-pecuniary general damages, then it must cease. Of course, this would not prevent cross deductibility against other heads of damage.

[77] See above footnote 35

(v) Non-Pecuniary Damages

Protected defendants are entitled to deduct $44,367.24 from the non-pecuniary general damage awards and $22,183.63 from *FLA* awards for loss of care, guidance and companionship. These reductions are to be made before contributory negligence is deducted under the *Negligence Act*.[78]

In our example, there is no contributory negligence. Accordingly, the injured plaintiff's claim is reduced by $44,367.24 to $55,632.76, the wife's *FLA* claim is reduced by $22,183.63 to $7,816.37 and the son's *FLA* claim is reduced to zero.

If we assumed that there was 10% contributory negligence, then it is not entirely clear what is owed. This is the same problem that arose for loss of income claims. The question is, do we deduct 10% of $100,000.00 or 10% of $55,632.76? It is my belief that one would deduct 10% of the $55,632.76 figure.[79]

C. A Mixture of Protected and Unprotected Defendants

(i) Introduction

When there is an action involving both protected and unprotected defendants, calculating the liability of each defendant for the plaintiff's damages becomes quite complicated. In an appendix to this paper, I have outlined a step-by-step approach to these calculations. This part of the paper will provide detailed explanations for the calculation rules set forth in the appendix.

Before tort reform, tortfeasors who caused the same damage were jointly and severally liable to the plaintiff. This joint and several liability was imposed by the provisions of the *Negligence Act.* Accordingly, a municipality that was 10% at fault for the plaintiff's injuries was only required to

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[78]Paragraph 267.5(7)4. This paragraph only refers to the *Negligence Act*, R.S.O. 1990, c. N.1 as amended. The reductions to the *FLA* claims are technically made pursuant to the *FLA* rather than the *Negligence Act*. Also note that these deductibles are indexed and the ones used here are for 2023.

[79] See discussion above under "Pre-Trial Loss of Income Claims" III.B.i above. Paragraph 267.5(7)4 indicates that the deductibles reduce the damages rather than the liability for the damages for protected defendants. This strongly suggests that the damages to be apportioned under section 3 of the *Negligence Act* are the deductible reduced damages. It is possible that a different approach should be taken to loss of income and non-pecuniary damages but there does not appear to be a cogent reason to do so.

pay 10% of the plaintiff's assessed damages, unless the remaining defendants had insufficient assets.

The OMPP introduced the "threshold" concept in 1990. This threshold shielded motorists from liability for most crashes. The OMPP modified the joint and several liability rules for non-motorists. Non-motorists became severally liable for the damage they caused under the OMPP. This concept was carried forward into Bill 164 for pecuniary losses, which motorists were completely shielded from paying. However, Bill 164 introduced deductibles for non-pecuniary damages; deductibles that were only available to motorists. To determine how non-pecuniary damages would be divided between motorists and non-motorists, Bill 164 introduced a complex apportionment provision.[80] This provision has been carried forward into AIRS almost unchanged. However, this provision applies to the apportionment of damages between protected and unprotected defendants with regards to all heads of damages, not just non-pecuniary damages. The concept of several liability was dropped in AIRS.

(ii) The Approach to Apportionment

The subsection that prescribes the apportionment formula is 267.7(1). This provision has three major components. Clause (a) deals with the liability of unprotected defendants to the plaintiff. Clause (b) deals with the obligation of unprotected defendants to make contribution and indemnify protected defendants and clause (c) deals with a protected defendant's obligation to make contribution and indemnify unprotected defendants. You will note that this subsection does not deal with the liability of protected defendants to the plaintiff. This is dealt with in section 267.5. Although not explicitly stated, given the sequence of the sections and the wording of subsection 267.8(3), one would expect that any apportionment pursuant to subsection 267.7(1) is to be undertaken before collateral benefits are deducted.[81]

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[80] Now section 267.1 of the *Insurance Act*.

[81] Some commentators believe that collateral benefits are deducted as part of the apportionment calculation. See footnote 89 below.

One final point should be made before the individual clauses are analysed. This section only applies if there is a mixture of defendants or, at least, a potential mixture of defendants.[82] If the defendants are all unprotected, then this subsection does not apply and the provisions of the *Negligence Act* are germane. Accordingly, if the plaintiff's actions contributed to his damages and the only other persons at fault are unprotected, section 267.7 is inapplicable. This could easily occur where the plaintiff and a road authority are the only parties at fault for a crash. As section 267.7 would apply to any claim by a passenger, it is possible for the partially at-fault driver to recover a greater percentage of his or her damages than an innocent passenger.

Clause (a) is divided into two sub-clauses. The first specifies the damages that all defendants are jointly and severally liable to pay to the plaintiff. Essentially, all defendants are jointly and severally liable for all damages that the protected defendant is found liable to pay after applying the damage reduction provisions set forth in section 267.5 (the "AIRS damages"). The second sub-clause outlines which damages the unprotected defendants are solely liable for. This is the provision that the Court of Appeal interpreted in the *Sullivan Estate* case.[83]

The balance of this "*The Approach to Apportionment"* section contains a detailed discussion of how subsection 267.7(1) works. It also outlines possible interpretative problems and my proposed resolutions of those problems. If you simply wish to carry out calculations, you can skip down to section "*(iii) A Simplified Method to Calculate the Amount Owed"*.[84]

(a) *Sullivan Estate v. Bond* and calculations under clause 267.7(1)(a)

The Court of Appeal's decision deals with the interpretation of sub-clause (a)(ii). That provision reads:

> the other persons,…
> (ii) are solely liable for any amount by which the amount mentioned in sub-clause (i) is less than the amount that the other persons would have been liable to make contribution

[82] Recall that subsection 267.7(3) obliges the Court to apply the subsection even if some of the persons at fault are not sued. Therefore, a plaintiff cannot avoid the effects of the subsection by simply failing to sue a protected defendant.

[83] (2001), 148 OAC 86

[84] See below at page 31.

> and indemnify the protected defendants in respect of damages in the absence of section 267.5.

The Court of Appeal has held that the proper way to interpret sub-clause (a)(ii) is as follows. First calculate the damages at common law. This number is then multiplied by the unprotected defendant's liability as determined under section 1 of the *Negligence Act* (that is the common law damages multiplied by percentage of fault).[85] From this figure the AIRS damages are subtracted [i.e. the figure determined under sub-clause (a)(i)].

If one assumes that we are dealing with general damages of $100,000.00 and fault is apportioned 80/20 against the protected defendant, then the result would be as follows. The damages at common law are $100,000.00. To determine the damages for which the unprotected defendant is solely liable under sub-clause 267.7(1)(a)(ii), this number would be multiplied by 20% yielding $20,000.00. From this $20,000.00 would be deducted the AIRS damages. Since the deductible is $44,367.24, the AIRS damages are $55,632.76 ($100,000.00 less $44,367,24). The result is a negative number ($20,000.00 less $55,632.76). The unprotected defendant is not solely liable for any damages. Therefore, the plaintiff only recovers the damages calculated under the first sub-clause ($55,632.76) – the AIRS damages.[86]

<u>(b) Clause 267.7(1)(b)</u>

In *Sullivan Estate*, the Court of Appeal indicated that the parties agreed that this clause was clear and unambiguous. It reads as follows:

> ...the other persons are liable to make contribution and indemnify the protected defendants in respect of damages to the same extent as if section 267.5 did not apply, up to the amount for which the protected defendants are liable having regard to section 267.5

[85] Actually, a proper interpretation of this provision requires the calculation of what would have been paid absent section 267.5. Where the defendants are unrelated liability would be determined by applying the provisions of the *Negligence Act*. The vast majority of cases will be determined in this manner. However, a contractual indemnity between defendants could lead to a different result than would be dictated by the *Negligence Act*.

[86] See *McLean v. Knox* 2012 CarswellOnt 10299, (Ont. S.C. per R.J. Smith J.) for a very muddled discussion of this section that assumes (incorrectly, it is submitted) that the plaintiff recovers the damages payable by the protected defendant plus the product of the unprotected defendant’s negligence and the amount of the deductible.

I believe that this provision is at least as difficult to interpret as sub-clause (a)(ii). There are two probable interpretations. The difference between these two interpretations turns on the meaning of the phrase "to the same extent as if section 267.5 did not apply". The first approach is to treat these words as an instruction to the court to multiply the joint and several damages [i.e., the damages determined under sub-clause 267.7(1)(a)(i)] by the unprotected defendant's percentage liability which would usually be determined under the *Negligence Act*.

Alternatively, this phrase may refer to the actual amount that the unprotected defendant would be liable for at common law. This would be an instruction to multiply the common law damages, not the joint and several damages, by the percentage liability and to then compare this product to the damages determined under sub-clause 267.7(1)(a)(i). The second interpretation is consistent with the Court of Appeal's interpretation of similar, but not identical, language in sub-clause 267.7(1)(a)(ii). Some support for this interpretation may also be found in subsection 267.5(10). Additionally, if the first interpretation is correct, then it is difficult to understand the reason for including the second condition in the clause.

The second interpretation may lead to other problems if my views with respect to the deductibility of collateral benefits are correct; problems that do not arise if the first interpretation is the correct one. [87] Further, the first interpretation is more favourable to the unprotected defendant and the second is more favourable to the protected defendant. I believe that both interpretations are flawed. However, I have reluctantly adopted the second interpretation for calculating damages in this paper. I believe that the second interpretation best utilizes all the words in the clause. It is also the interpretation advocated by the successful appellants in the *Sullivan Estate* case. Additionally, interpretation two may be supported by the Court of Appeal's decision in *Jack (Litigation Guardian of) v. Kirkrude*.[88]

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[87] Discussed under the heading "Collateral Benefits" at III.C.iv.a below.

[88] [2002] O.J. No. 192 modifying [2000] CarswellOnt 4969. This case, decided under Bill 164, adopted the second interpretation based on a concession by counsel. The unprotected defendant was found 90% at fault and the protected 10% at fault. It was assumed that *Sullivan Estate* mandated that the unprotected defendant pay 90% of the general damage award. This would be consistent with interpretation two. However, the total judgment was in excess of 90% as the protected defendant paid 10% of the judgment less the deductible. This, in my view, is more than *Sullivan Estate* required as the protected defendant should have paid nothing. However, this result may be explained by the fact that the protected defendant did not appeal the trial judgment.

Utilizing the second interpretation, this clause instructs the court to take the lesser of common law damages multiplied by the unprotected defendant's percentage liability and the AIRS damages [damages calculated under sub-clause 267.7(1)(a)(i)]. In the example just cited, this would be $20,000.00 [the lesser of $100,000.00 x 20% and $55,632.76]. It should be noted that this approach obliges the unprotected defendant to pay an amount in excess of 20% [approximately 20/55ths] of the plaintiff's recoverable damages.

If the liability split was reversed (80% to the unprotected defendant), then the calculations would be as follows: Under clause 267.7(1)(a) the unprotected defendant would be jointly and severally liable for the AIRS damages ($100,000 less the deductible or $55,632.76) and under clause 267.7(1)(b) the unprotected defendant would be solely liable for the common law damages of $100,000 multiplied by its percentage fault of 80% less the AIRS damages of $55,632.76 or $24,367.24. Its total potential liability under this subsection is $80,0000. Under clause 267.7(1)(b) it is obliged to indemnify the protected defendant. The indemnity obligation is the common law damages of $100,000 multiplied by the percentage liability of the unprotected defendant (80%) or $80,000. However, its obligation is capped at the AIRS damages ($55,632.76). As the common law damages times percentage liability exceeds the AIRS damages, it is obliged to indemnify the protected defendant for its entire exposure. It must also pay its sole liability of $24,367.24 resulting it paying the entirety of the plaintiff's recoverable damages of $80,000.

(c) Clause 267.7(1)(c)

Paragraph (c) provides that the protected defendants are obliged to indemnify the unprotected defendants. The amount of such liability is calculated as the difference between the number calculated in sub-clause (a)(i) and clause (b). In the present example, this amount would be $35,632.76 [$55,632.76 less $20,000.00].[89]

[89] This approach to these clauses is advocated by S. G. McKee and L. Chiarotto in their paper entitled "Unprotected Defendants: Out of Sight, Out of Mind", *Practical Strategies for Advocates (VII),* (Advocates' Society, Toronto, January 1998). The interpretation of clause 267.7(1)(a) advocated by these authors was accepted by the Court of Appeal in *Sullivan Estate*. However, this case does not interpret these clauses. The parties in the *Sullivan Estate* case agreed that these provisions were clear and unambiguous.

These calculations must be carried out separately with respect to each head of damages.[90]

(iii) A Simplified Method for Calculating the Amount Owed

If the second interpretation is the correct one, then there is an easy method for determining the damages the plaintiff is entitled to recover and how they should be apportioned. This determination, as mentioned previously, must be made with respect to each head of damages.

The unprotected defendant must always pay or contribute the product of its percentage liability and the common law damages. If this number exceeds the AIRS damages, then this is the total award the plaintiff receives and all of the damages are paid by the unprotected defendant. If this number is less than the AIRS damages, then the plaintiff receives AIRS damages only. The protected defendant pays the difference between the AIRS damages and the amount the unprotected defendant contributes. Two examples will clarify the use of this simplified rule.

First, let us assume that the pre-trial income loss is $100,000.00 at common law and $70,000.00 under AIRS. Then, let us assume that the unprotected defendant is 20% at fault. The product of the common law damages and the percentage fault of the unprotected defendant is $20,000.00 ($100,000 x 20%). This is less than the AIRS damages. Accordingly, the plaintiff only recovers the AIRS damages of $70,000.00. The unprotected defendant pays $20,000.00 and the protected defendant pays the difference between this amount and the AIRS damages, which is $50,000.00.

Now let us assume that the unprotected defendant is 80% at fault. The unprotected defendant must pay or contribute $80,000.00 ($100,000.00 x 80%). Since this exceeds the AIRS damages, the plaintiff receives this amount [$80,000.00] from the unprotected defendant. The protected defendant pays nothing. However, if the unprotected defendant is judgment proof, then the protected defendant would be obliged to pay the AIRS damages of $70,000.

For the sake of completeness, I will not use this simplified method in carrying out the calculations in the balance of this paper.

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[90] Since past and future loss of income claims are divided differently as between protected and unprotected defendants, it would seem to follow that past and future collateral benefits will be divided differently as well.

(iv) Pre-Trial Loss of Income Claims

I will continue with the example we were using under the heading *"All Defendants are Protected"* but I will assume 10% contributory negligence, 70% negligence on the part of the unprotected defendant and 20% on the part of the protected defendant.

Although, as discussed, the past and future loss of income claims are combined for the purpose of deducting past collateral benefits. They still need to be calculated separately as the law and the legislation use different approaches for calculating past and future income claims and only past claims attract prejudgment interest.

The first step is to calculate the liability of the unprotected defendants at common law. This would be 100% of the gross loss of income before trial, or $104,000.00.[91]

We must repeat a calculation we have previously done, namely calculate the liability of the protected defendant for the pre-trial loss of income. We have previously determined that this figure is $71,400.00.[92] This figure must be reduced by 10% for contributory negligence to determine the amount under sub-clause (a)(i). This figure is $64,260.00.[93]

The next step is to perform the apportionment calculations mandated by section 267.7. The calculation for sub-clause (a)(i) is simply the $64,260.00 figure calculated above. Accordingly, both of the defendants are jointly and severally liable for this amount. The figure for sub-clause (a)(ii) is the product of $104,000.00 and the unprotected defendant's percentage fault [70%] or $72,800.00 less the number calculated under (a)(i) yielding $8,540.00. This is the amount the unprotected defendant is solely liable for. The plaintiff recovers the sum of the amounts calculated in (a)(i) and (a)(ii) or $72,800.00.

The figure required for clause (b) is the product of the common law damages and the unprotected defendant's percentage liability ($72,800.00) up to a cap of $64,260.00. This capped figure is the

[91] 100% of the pre-trial loss would be $2,000.00 per week x 52 weeks.

[92] 70% of gross income after the first seven days or $1,400.00 per week x 51 weeks.

[93] I have assumed a reduction of 10% to the amount calculated under subsection 267.5(1). See discussion at "Pre-Trial Loss of Income" at III.B.i above.

unprotected defendant's "share" of the joint and several damages ($64,260.00). In addition, the unprotected defendant is liable to pay the plaintiff the damages it is solely liable for, which are $8,540.00. In total, it must pay $72,800.00 ($64,260.00 plus $8,540.00).

One would obtain the figure for clause (c) by calculating the difference between the figure calculated in (a)(i) and (b) [$64,260.00 less $64,260.00] or $0.00 in this case. This is the protected defendant's "share" of the joint and several damages.

These calculations indicate that if both defendants are solvent, then their respective liabilities to the plaintiff are $0.00 for the protected defendant and $72,800.00 for the unprotected defendant. If the unprotected defendant was insolvent, then the protected defendant would pay the plaintiff $64,260.00.

(a) Collateral Benefits

The next step is to deduct collateral benefits. In our example the total deductible collateral benefits are $30,600.00.[94] As the joint and several damages are $64,260 this sum is reduced by $30,600.00 to $33,660.00. The unprotected defendant is liable for this entire amount plus $8,540 or $42,200 in total.[95]

This example demonstrates the problem with interpretation two of clause 267(1)(b) adverted to at page 28 above. If this interpretation is correct, then every time the unprotected defendant's

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[94] $20,400.00 from the SABs insurer and $10,400.00 from the disability insurer but $200.00 of that is not deductible as it relates to a benefit paid with respect to the first 7 days after the accident which is not deductible by anyone.

[95] In this case, the joint and several damages were wiped out by the collateral benefits. That will not always occur. The question that arises is how those collateral benefits are apportioned between the protected and unprotected defendants. The apportionment clauses [267.7(1)(b) and (c)] always oblige the unprotected defendant to contribute more than its percentage liability to the joint and several damages. Are the collateral benefits apportioned in accordance with the provisions of the *Negligence Act* or the apportionment clauses? The protected defendant will argue that the apportionment should be in accordance with the *Negligence Act* and the unprotected defendant will argue the opposite. I believe the unprotected defendant has the stronger argument. If subsection 267.7(1) replaces the provisions of the *Negligence Act* with respect to apportioning damages as between protected and unprotected defendants, then the collateral benefits should be apportioned in the same manner. Additionally, the order of sections in Bill 198 also appears to be the order that calculations are to be carried out. This is not the position favoured by Alan Rachlin, who successfully argued the *Sullivan Estate* case. Please note that in *Cadieu v Cloutier* 2018 CarsellOnt 20777 (C.A.) the court indicated that collaterals should be deducted in proportion to the defendant's negligence. Since the case involved two protected defendants the question raised in this footnote remains unanswered.

liability exceeds the joint and several damages calculated under sub-clause 267.7(1)(a), the unprotected defendant will pay all of the pre-trial loss of income claim. This approach strips subsection 267.8(3) of any vitality. Subsection 267.8(3) provides that loss of income collateral benefits are to be deducted first from the damages for which all defendants are jointly and severally liable and any excess amount is to be deducted from the damages for which the unprotected defendant is solely liable. The intention of the subsection is to provide protected defendants with a partial priority with respect to the deduction of these collateral benefits. However, in every situation where this subsection might be engaged the only party who is liable for the damages is the unprotected defendant. Accordingly, this priority provision will never make any difference to the amounts actually paid by the defendants.

This problem can be overcome if one deducts the collateral benefits as one of the steps in the subsection 267.7(1) calculations rather than after these calculations have been completed. This is the approach recommended by Gordon McKee and Alan Rachlin, who successfully argued the appeal in the *Sullivan Estate* case.[96] If collateral benefits are deducted during these calculations, then subsection 267.8(3) still has vitality. However, there are problems with this approach as well.[97]

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[96] See footnote 89 above.

[97] If one adopts this approach, then one runs into problems with, what I refer to as, "vanishing collaterals". An example will assist in understanding this problem. Let us assume the pre-trial loss of income is $100,000.00 and thus 70% of the gross loss of income is $70,000.00. Let us further assume that the unprotected defendant is 50% at fault and the collateral benefits are $25,000.00. Using the McKee/Rachlin approach one would first calculate damages at common law and under AIRS taking into account the collateral benefits. The figure under sub-clause 267.7(1)(a)(i) would be the damages under AIRS ($70,000.00) less the collateral benefits of $25,000.00 yielding $45,000.00.[97] The number under sub-clause 267.7(1)(a)(ii) would be $100,000 x 50% or $50,000.00. The unprotected defendant would be solely liable for the difference between $50,000.00 and $45,000.00, or $5,000.00. Under this scenario the plaintiff recovers $50,000.00 in tort ($45,000.00 plus $5,000.00) and receives a further $25,000.00 in collateral benefits. The plaintiff's total recovery is $75,000.00.

If the plaintiff had not received any collateral benefits, the calculation would be as follows. The number under sub-clause 267.7(1)(a)(i) would be the AIRS damages, or $70,000.00. The number under sub-clause 267.7(1)(a)(ii) would be $100,000.00 x 50% less $70,000 yielding zero dollars. The plaintiff would receive a total of $70,000.00 in tort damages and collateral benefits (none). $50,000 of that amount would be paid by the unprotected defendant and $20,000.00 by the protected defendant. The plaintiff who receives collateral benefits recovers more than the plaintiff who does not. However, the difference in recovery is not equal to the collateral benefits paid. In this example and depending on how you view it, $5,000.00 or $10,000.00 in collateral benefits has simply vanished during the calculation.

In my opinion, collateral benefits must be deducted after the apportioning has been completed under subsection 267.7(1). Subsection 267.8(3) states that collateral benefits are to be deducted from the amounts calculated under sub-clauses 267.7(a)(i) and (ii). This implies that those calculations must be completed before the collateral benefits are deducted.

Unfortunately, none of these conflicting interpretations permits the provisions to mesh properly. Interpretation one does not seem to be consistent with either the sub-clause's language or the decision in *Sullivan Estate*. This interpretation, however, does not create a vanishing collaterals problem, nor does it strip subsection 267.8(3) of its vitality. Interpretation two creates a vanishing collaterals problem if the McKee/Rachlin approach to deducting collaterals is utilized. Further, interpretation two strips subsection 267.8(3) of any vitality if my approach to the deduction of collaterals is utilized. Incidentally, none of these interpretive problems arise if the approach to sub-clause 267.7(1)(a(ii) adopted by the motion's court judge in *Sullivan Estate* is adopted.[98]

(v) Health Care Expenses

In our example, the injury is over threshold. Therefore, the protected defendant must contribute to this claim. The pre-trial health care expenses are $10,000.00. This figure must be reduced by 10% to $9,000.00 to account for the plaintiff's contributory negligence.[99] The calculations under subsection 267.7(1) yield the following results:

(a) $9,000.00 for sub-paragraph (a)(i);

(b) $0.00 for sub-paragraph (a)(ii);

(c) $7,000.00 for paragraph (b); and

(d) $2,000.00 for paragraph (c).

Since there is no priority for the deductibility of collateral health care benefits, these are deducted in proportion to the defendant's liability. Accordingly, the unprotected defendant deducts 7/9ths

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[98] If the collateral benefits wipe out the past loss of income or earning capacity claim, then any remaining benefits would be used to reduce the future loss of income claim. The same holds true for health care expenses and other pecuniary losses.

[99] If there was a future award, subsection 267.8(4) suggests that it would be added to the pre-trial health care expense award and reduced by the contributory negligence before the section 267.7 calculation is done.

of the benefits of $7,500.00, or $5,833.33. The protected defendant deducts 2/9ths, or $1,666.67. The net awards to the plaintiff are $1,166.67 from the unprotected defendant and $333.33 from the protected defendant.

(vi) Other Pecuniary Losses

Since there are no priority provisions applicable to such losses, they would be handled in the same manner as health care expenses in a threshold piercing injury case.

(vii) Future Pecuniary Losses

There are no issues with regards to calculating future pecuniary damages that have not been previously addressed.

(viii) Non-Pecuniary Damages

The effect of section 267.7 makes these calculations tricky. Since the plaintiff was 10% contributorily negligent, the plaintiffs' damages are reduced by 10%. For non-pecuniary damages, clause 267.5(7)(4) provides that the deductibles are to be subtracted before the award is reduced to account for contributory negligence. In our example, the injured plaintiff would be entitled to $50,069.48 [($100,000 -$44,367.24) x 90%] from the protected defendant.[100] His wife's claim would be reduced to $7,034.73 [($30,000 - $22,183.64) x 90%] and the son's to zero.

This now takes us to the calculations required by subsection 267.7(1). They yield the following results:[101]

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[100] $100,000.00 less the deductible of $44,367.24 yields $55,632.76 and 10% must be subtracted from that amount yielding $50,069.48.

[101] When calculating the damages for sub-clause (a)(i) the contributory negligence must be deducted. However, contributory negligence is not deducted for the calculations under sub-clause (a)(ii) and clause (b). This is due to the fact that by multiplying common law damages only by the unprotected defendant’s percentage liability (here 70%) the contributory negligence has already been accounted for. The contributory negligence is included in the other 30%.

	Injured Plaintiff	Wife	Son
subparagraph (a)(i); joint and several liability of all defendants	$50,069.84	$7,034.73	0.00
subparagraph(a)(ii); sole liability of unprotected defendant	$19,930.16 [$100,000 x 70% less $50,069.84]	$7,034.73 [$30,000.00 x 70% less $22,183.63]	$3,500.00 [$5,000.00 x 70% less $0.00]
paragraph (b); unprotected defendant's contribution to joint and several liability	$50,069.84	$7,034.76	$0.00
paragraph (c); protected defendant's contribution to joint and several liability	$0.00	$ 0.00	$0.00

D. Pre-judgment Interest and Advance Payments

Advance payments, under either the *Insurance Act* or the *Courts of Justice Act,*[102] should be considered after the above calculations are completed. The case law indicates that such advance payments should be applied to principal first rather than to interest.[103] Different types of damages

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[102] R.S.O. 1990, c. C.43

[103]See *Baart v. Kumar* (1985), 20 C.C.L.I. 232 (B.C.C.A); *Downey v. Maes* (1992), 8 O.R. (3d) 440 and *Stelco Inc. v. Royal Insurance Co. of Canada* (1993), 18 C.C.L.I. (2d) 238 (Ont.C.J. - Gen. Div.), varied on other grounds (1997), 34 O.R. (3d) 263 (C.A.). The Court of Appeal upheld the trial judge's decision regarding the application of payments.

attract different interest rates. One case has held that the advance payment should be applied first to the damages that attract the highest rate of interest.[104]

Once any advance payments have been deducted, pre-judgment interest on each of the awards needs to be calculated. Keep in mind that the date for calculating pre-judgment interest is the date of the judgment and not the first day of trial.

E. Death Benefits

As mentioned earlier, considering the Court of Appeal decision *McCartney v. Islic*, damage awards under clause 61(2)(e) of the *FLA* will likely be treated as non-pecuniary in nature. [105] Accordingly, death benefits should not be deductible from loss of care, guidance and companionship awards in accordance with subsection 267.8(7) of AIRS. Additionally, any amount received as a survivor's benefit under the *Canada Pension Plan*[106] is not deductible.[107]

IV. TACTICAL CONSIDERATIONS

The most striking feature of damage calculations under AIRS is the very different treatment of pre-trial and future loss of income claims. Once the trial starts, the recovery for the loss of income claim increases from 70% of gross income to 100% of gross income.[108] This can make a significant difference to the plaintiff's recovery. Because of this factor, there is a significant incentive for plaintiffs to get their cases to trial as quickly as possible. This factor must be weighed against the equally important consideration of not rushing a case to trial before the plaintiff's damages can be properly assessed. Any unexplained delay in setting an action down for trial may be regarded as professional negligence. Each file requires a timetable and counsel should obtain their client's agreement to that timetable. The rationale for the timetable should be

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[104] *Illingworth v. Elford*, [1996] O.J. No. 2893

[105] 46 O.R. (3d) 669; see also *Di Girolamo v. Smolen*, [2002] O.J. No. 1526, 59 O.R. (3d) 357 (per Spiegel J.).

[106] R.S.C. 1985, c. C-5

[107] See *Di Girolamo v. Smolen*, above at footnote 105, which held that section 63 of the *FLA* takes precedence over subsection 267.8(1) of the *Insurance Act*.

[108] The differences were even more significant, particularly for high income earners, when the pretrial loss of income was limited to 80% of net income rather than to 70% of gross income.

explained in a letter to the client. At a minimum a memo to file should be prepared. Once the timetable is established, it must be followed. If it is not, then the reasons should be documented.

The flip side to this is that counsel for protected defendants, and possibly all defendants, have an incentive, where there is a continuing loss of income, to delay the trial. The clear intent of these provisions is to provide an incentive to plaintiffs to get to trial as quickly as possible. I believe the courts should be sceptical of requests for adjournments which will lead to significant reductions in the plaintiff's future recovery. Assignment court judges should consider refusing to grant defence adjournment requests unless the defence agrees that damages shall be deemed to be assessed as of the date the case was originally scheduled to proceed.

At mediation, the parties need to agree on the date that the case will likely be tried. The quantum of any settlement may hinge on this date. Without such an agreement, it may be difficult to agree on damage figures. It would be preferable to reach an agreement on the assessment date before the mediation.

In analysing a file, plaintiff's counsel must consider the three types of damage awards that are affected by AIRS. As mentioned previously, they are non-pecuniary damages, pre-trial loss of income claims and health care expense claims. Since each head of damages is calculated separately, each type of damage must be considered separately. Unless the ratio of damages under AIRS as compared to damages calculated at common law is less than the percentage liability of the unprotected defendants, no additional monies will be recovered by suing an unprotected defendant.[109] For example, if general damages are $100,000 at common law (which will be reduced to approximately $56,000 by the deductible), the plaintiff will not recover any additional damages by suing the unprotected defendant unless that defendant is more than 56% at fault.[110]

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[109] If the ratio of AIRS damages: common law damages < % liability of unprotected defendants, then the plaintiff can recover additional damages

[110] One cannot avoid this result by only suing unprotected defendants. Subsection 267.7(3) obliges the court to consider the liability of non-parties when apportioning damages under subsection 267.7(1).

In most serious personal injury cases, the deductible will be irrelevant since the damages will exceed the vanishing deductible. This implies that in serious cases where the protected defendant has sufficient insurance there may be little reason to name the unprotected defendants in the action. In less serious cases, it will be a more significant consideration.

If, however, the injury does not pierce the threshold, then the plaintiff will recover his or her non-pecuniary general damages (including *FLA* damages) from an unprotected defendant in proportion to its liability.

Under AIRS, excess health care expenses can be recovered from protected defendants if the injury satisfies the verbal threshold. It is going to be the rare case where there will be excess health care expenses and the case does not satisfy the verbal threshold. Therefore, the existence of excess health care expenses will rarely be a factor in deciding whether to sue an unprotected defendant.

Under the *Sullivan Estate* decision, the unprotected defendant will never be called upon to pay more than it would have been obliged to pay at common law. A review of some of the earlier calculations demonstrates that, in many cases, the unprotected defendant may be obliged to pay more of the damages than its percentage liability for the accident would suggest.[111] This decision may have increased the incentive for protected defendants to third party unprotected defendants. In any case where a protected defendant is even partly at fault, the protected defendant receives all of the benefit of the damage reduction mechanisms. In addition, the protected defendant's obligation to contribute to the damages for which it is jointly and severally liable will be less than under the *Negligence Act*. To put it a little differently, it is only the plaintiff that loses under AIRS. The amount that the unprotected defendant is obliged to pay does not change. The amount the protected defendant pays or is obliged to contribute under the *Negligence Act* is reduced by precisely the amount that the plaintiff loses.

Offers to settle can be tricky to draft. Since the loss of income claim is dependant on the trial date, all parties will need to consider drafting offers that reflect this reality. I would suggest

[111] See example at last paragraph of section IIIC(ii)(b) at page 30 above. Quaere, if an unprotected defendant is third partied is its liability to the protected defendant calculated under the provisions of the *Negligence Act* or in accordance with clauses 267.7(1)(b) and (c)?

drafting offers that assume the trial will take place on a certain date but include adjustment clauses which kick in if the trial proceeds on a different date. Hopefully, this will provide enough certainty to the offer to ensure that it has costs consequences but will offer enough flexibility if the trial proceeds later than anticipated.

As previously discussed, the future collateral benefits trust provisions, if applied literally, could oblige plaintiffs to pay back more of a judgment than is fair.[112] One must be very careful in drafting minutes of settlement and judgments to avoid this result. The practice of simply parroting the legislative language in minutes of settlement and judgments could lead to unanticipated problems for plaintiffs.

With respect to costs, they tend to be apportioned at trial in accordance with the degrees of fault found under the *Negligence Act*. Protected defendants might wish to consider asking the trial judge to apportion costs in the same ratio as damages are apportioned. This would usually result in a more favourable apportionment to the protected defendant than an apportionment based on degrees of fault.[113]

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[112] See discussion at the last two paragraphs of III.B.iv above.

[113] This could prove to be tricky as the apportionment may be different for different heads of damage.

APPENDIX
DAMAGE CALCULATION RULES

These rules assume that there is a mixture of protected and unprotected defendants. The example that is used is the one presented in the paper under "A Mixture of Defendants".

1. Calculate the damages for each of the following heads of damage in the same manner as you would at common law:

    (a) Pre-trial loss of income;

    (b) Future loss of income;

    (c) Health Care Expenses;

    (d) Other Pecuniary Losses; and

    (e) Non-Pecuniary Losses.

2. Calculate the protected defendants' liability for pre-trial loss of income. Take 70% of the gross loss of income for the period commencing seven days after the crash and ending on the first day of trial. This is the protected defendants' liability for pre-trial loss of income.

3. Take the figure from 1(e) above and deduct the appropriate deductible. If the injury is does not pierce the threshold, then the amount is zero.

4. Reduce the figures calculated under 1(b), (c), (d), 2 and 3 above by the contributory negligence of the plaintiff. If a figure calculated under another rule has been reduced because of the use of this rule, then I will refer to it as a figure calculated under rule 4-x (for example the figure calculated in accordance with rule 2 is then reduced under this rule the figure would be referred to as the figure calculated under rule 4-2).

5. Each head of damages must now be apportioned as between the protected and unprotected defendants.

    (a) For pre-trial loss of income:

        (i) take the number from rule 2 or 4-2 (depending on whether there is contributory negligence). The protected and unprotected defendants are jointly and severally liable for this amount;

        (ii) the unprotected defendants are solely liable to the plaintiffs (on a joint and several basis as between themselves) for the product of the amount calculated in rules 1(a) and their percentage liability less the amount calculated in rules 5-1(a)(i). If the difference is zero or less, then there is no sole liability to the plaintiffs;

(iii) the unprotected defendants' share of the joint and several liability is the product of rule 1(a) and the unprotected defendant's percentage liability up to the number calculated in 5(a)(i);

(iv) the protected defendants' share of the joint and several liability is the figure calculated in rule 5(a)(i) less the figure calculated in rule 5(a)(iii);

(v) the total liability of the protected defendants is the figure calculated in rule 5(a)(iv);

(vi) the total liability of the unprotected defendants is the sum of the figures calculated in rule 5(a) (ii) and (iii).

(b) For future loss of income or earning capacity, take the figure calculated in rules 1(b) or 5-1(b) and apportion it in accordance with the defendants' relative degrees of fault.

(c) For health care expenses, the rules differ depending on whether the injury does or does not pierce the threshold. First reduce the damages calculated under rules 1(c) or 4-1(c) by any collateral benefits. If the injury does not pierce the threshold, then the unprotected defendants, as between themselves, are jointly and severally liable for the net damages multiplied by their proportionate negligence. If the injury does pierce the threshold, then one simply takes the net damages and apportions them in accordance with each defendant's percentage liability.

(d) For other pecuniary losses take the figure calculated from rule 1(c) or 4-1(d), reduce it for any collateral benefits and apportion it in accordance with the defendants' relative degrees of fault.

(e) For non-pecuniary damages:

(i) the protected and unprotected defendants are jointly and severally liable for the figure calculated under rule 3 or 4-3;

(ii) the unprotected defendants are solely liable for the difference, if any, between the figure calculated under rule 1(e) multiplied by their percentage liability and the figure calculated under rule 5(e)(i);

(iii) the unprotected defendants' share of the joint and several liability is the lesser of the amount calculated by multiplying the figure in rule 1(e) by their percentage liability and the figure calculated under rule 5(e)(i);

(iv) the protected defendants' share of the joint and several liability is the figure calculated in rule 5(e)(i) less the figure calculated in 5(e)(iii);

(v) the total liability of the protected defendants is the figure calculated in 5(e)(iv) above;

(vi) the total liability of the unprotected defendants is the sum of the figures calculated in rules 5(ii) and (iii).

6. The next step is to deduct the appropriate pre-trial collateral benefits from the damage awards calculated in Rule 5.

For loss of income claims, protected defendants receive partial priority with regards to deducting pre-trial loss of income collateral benefits. These benefits are first deducted from the figures determined in Rule 5(a)(iii) and (iv) in proportion to their liability for any joint and several damages (i.e., in proportion to their liability to indemnify each other under the rules 5(a)(iii) and (iv)). Any remaining loss of income collateral benefits are then deducted from the figure calculated under Rule 5(a)(ii). Any leftover collateral benefits (i.e. after all of the protected defendant's liability is reduced to zero for pre-trial losses) can be deducted from the future loss of income award.

All other collateral benefits are divided between the defendants in relation to their fault and deducted from the appropriate head of damages. It is clear that past health care and other pecuniary loss collateral benefits can be deducted from future health care expenses and future other pecuniary claims.

7. Future collateral benefits are held in trust by the plaintiff for the defendants and are apportioned between all defendants in accordance with their obligation to pay damages as calculated under subsection 267.7(1) for each head of damages.

8. Advance payments are deducted from the damages as calculated above under Rule 6. It appears that they are first deducted from the heads of damage that attract the highest prejudgment interest.

9. Pre-judgment interest is calculated on all past losses and any non-pecuniary losses.

Example:

	Injured Plaintiff	**Wife**	**Son**
Rule 1(a)	$104,000.00	x	x
(b)	$104,000.00	x	x
(c)	$ 10,000.00	x	x
(d)	x	x	x
(e)	$100,000.00	$30,000.00	$5,000.00

Rule 2. Seventy percent of the injured plaintiff's pre-trial gross loss of income from seven days following the crash until the beginning of the trial is $71,400.00.

Rule 3. After subtracting the deductibles, the non-pecuniary damages of the plaintiffs are $55,632.76 for the injured plaintiff, $7,816.36 for the wife and nothing for the son.

Rule 4	**Injured Plaintiff**	**Wife**	**Son**
Rule 1 (b)	$93,600.00	x	x
(c)	$9,000.00	x	x
(d)	x	x	x
Rule 2	$64,260.00	x	x
Rule 3	$50,069.48	$7,034.72	zero

Rule 5(a) Pre-Trial Loss of Income	Injured Plaintiff
(i) all defendants joint and severally liable	$64,260.00
(ii) sole liability of unprotected defendant	$72,800 less 5(a)(i) $8,540.00
(iii) unprotected defendant's share of joint and several liability is amount under 1(a) x percent liability up to maximum of the amount calculated under rule 5(a)(i) [$72,800.00 which exceeds $64,260.00]	$64,260.00
(iv) protected defendant's share of joint and several liability ((i) minus (iii))	$0.00
(v) total liability of the protected defendant	$0.00
(vi) total liability of the unprotected defendants ((ii) plus (iii))	$72,800.00

Rule 5(b) Future Loss of Income

The future loss is $104,000.00 reduced by 10% to $93,600.00 which is, in turn, apportioned 70% of the $104,000.00 to the unprotected defendant ($72,800.00) and the balance of the $93,600.00 to the protected defendant ($20,800.00).

Rule 5(c) Health Care Expenses

As the injury pierces the threshold, the health care expenses of $10,000.00, reduced by 10% to $9,000.00, are apportioned in the same ratio as the Future Loss of Income. The protected defendant is liable for $2,000.00 and the unprotected defendant for $7,000.00.

Rule 5(d) Other Pecuniary Losses

There are no other pecuniary losses in this example.

Rule 5(e) Non-Pecuniary Damages	**Injured Plaintiff**	**Wife**	**Son**
(i) all defendants joint and severally liable	$50,069.48	$7,034,73	zero
(ii) sole liability of unprotected defendant ($100,000 x 70% less $50,069.48), ($30,000 x 70% less $7,034.73) and ($5,000 x 70% less zero)	$19,930.52	$13,965.27	$3,500.00
(iii) unprotected defendant's share of joint and several liability [lesser of (i) and (common law damages x 70%)}	$50,069.48	$7,034.73	zero
(iv) protected defendant's share of joint and several liability ((i) minus (iii))	zero	zero	zero
(v) total liability of the protected defendant	zero	zero	zero
(vi) total liability of the unprotected defendant ((ii) plus (iii))	$70,000.00	$21,000.00	$3,500.00

Rule 6

There are $30,600.00 of pre-trial collateral benefits which can be deducted from the loss of income award. The protected defendant has partial priority for their deduction. In this example, the collateral benefits will reduce the joint and several damages for loss of income to $33,360.00. The unprotected defendant will pay the entire loss. The future loss of income claim payable by the unprotected defendant is $72,800.00 and by the protected defendant is $20,800.00. Assuming that future collaterals of $600 per week are payable, this would reduce the future loss of income from $93,600 to $62,400 apportioned 2/9ths to the protected defendant and 7/9ths to the unprotected defendant.

The pre-trial health care collateral benefits of $7,500.00 would be split in the ratio of 2:7 - protected defendant to unprotected defendant reducing the unprotected defendant's contribution to $1,166.67 ($7,000.00 - [$7,500.00 x 7÷9]) and the protected defendant's contribution to $333.33 ($2,000.00 - [$7,500.00 x 2÷9])

Rule 7.

All future collateral benefits would be held in trust for the unprotected and protected defendants in the ratio 7:2.

Rules 8 and 9 have not been applied in this example.

The final amounts in the judgment for the plaintiffs look like this, with the injured plaintiff holding any future collateral benefits in trust for the defendants:

Injured Plaintiff

Claim	**Protected Defendant**	**Unprotected Defendant**
Pre-trial Loss of Income	$0.00	$33,360.00
Future Loss of Income	$20,800.00	$72,800.00
Health Care Expenses	$1,166.67	$333.33
Non-Pecuniary Damages	zero	$70,000.00
Total	$21,967.67	$176,493.33

The wife will recover $21,000.00 from the unprotected defendant. The son will recover $3,500.00 from the unprotected defendant.